Valenti was the managing owner of the *Carlos F. Roses*.

Both bills of exchange were cashed by the London River Plate Bank, Ltd., at Montevideo. On April 6th they were accepted by Kleinwort Sons & Company, and on May 9th were paid under discount by that firm (p. 19). It is alleged that at the time of the acceptance of the bills of exchange, bills of lading, covering the shipment of garlic and the jerked beef shipped for the account and by order of Pagés, endorsed in blank by Gibernau & Company, were delivered to the claimants, as security for the payment of the bills of exchange; and, thereafter the bill of lading, covering the shipment of jerked beef made for the account and by order of the *Carlos F. Roses*, was delivered, in like manner. It is alleged that, on April 9th, the bills of lading and invoices, covering the shipment of garlic and Pagés' share of the jerked beef, were mailed by Kleinwort Sons & Company to Gelak & Company, bankers, of Havana, to be held until the bill of exchange, charged to the account of Pagés, should be paid. Neither the instructions sent to Gelak & Company, nor a copy of them, were produced. It is alleged that the bills of lading and invoice covering the vessel's share of the shipment of jerked beef were retained by Kleinwort Sons & Company "pending the disposal of the said cargo." On May 17th, the day of the capture, Kleinwort Sons & Company cabled Gelak & Company requesting them to return the bills of lading and invoices which had been forwarded on April 9th. On June 9th, Gelak & Company replied that the bills and invoices had not been received (pp. 18–41). On October 21, the claimants produced these bills of lading, alleging that they had been received from Gelak & Company on October 18th (pp 35–36), and that neither Pagés, Gibernau & Company, nor the owners of the *Carlos F. Roses*

had paid the claimants anything for or on account of their acceptance and payment of the bills of exchange (p. 18).

The cause of the cargo was heard a second time upon the claim, test affidavit and Harcke's affidavits and a decree was entered, by which it was ordered that the claimants be paid an amount equal to the proceeds of the sale of the cargo (pp. 13–14). Thereupon, the United States took this appeal (pp. 15–17).

Assignments of Error.

We submit that the court below erred in the following respects (p. 15):

First. In holding that the cargo of the *Carlos F. Roses* was not lawful prize of war.

Second. In holding that the said cargo was privileged and exempt from capture and condemnation as property owned by neutrals.

Third. In dismissing the libel, so far as it related to the said cargo and ordering the proceeds of the sale of the same be paid to the claimants.

Fourth. In failing to hold that the said cargo was lawful prize of war and subject to condemnation as such.

ARGUMENT.

I.

The Cargo of the Carlos F. Roses was Enemy Property,

In its opinion, the court below did not make specific mention of the President's proclamation of April 26, 1898, in which it was provided :

"Second. Neutral goods not contraband of war are not liable to confiscation under the enemy's flag."

It is evident, however, that the decree of restitution was based upon the theory that the cargo, in some way, became the property of Kleinwort Sons and Company—British subjects—and thus came within this exemption.

The court having ordered further proofs, the burden of proving their ownership and the neutral character of the goods, by clear and positive evidence and beyond a reasonable doubt rested upon the claimants.

The London Packet, 5 *Wheat.* 132.
La Armisted De Rues, 5 *Wheat.* 385.
The Amiable Isabella, 6 *Wheat.* 1, 77.
The Santissima Trinidad, 7 *Wheat.* 283.
The Sally Magee, 3 *Wall.* 451.
The Jenny, 5 *Wall.* 183.

When the cause came on for hearing a second time, the claimants had wholly failed to prove their case. The three affidavits by Harcke and the exhibits which accompanied them were not competent evidence.

Under an order for further proof, the evidence must be in the form of depositions, taken under a commission, as in other admiralty cases, and of documents, duly proven.

3 *Greenleaf on Evidence*, §§ 457 *and* 467.
The George, 2 *Gall.*, 249, 252.
Rules, Supreme Court, U. S., § 12 ("*Further Proof*").

Claimants have not always been held to a strict compliance with this rule, but this court has always required that any affidavit, intended to be used as proof, should be taken under a commission, and all papers offered as

exhibits should be proved by persons who had personal knowledge of their execution.

The London Packet, 2 *Wheat.* 372, 373.
Story's Principles & Practice of Prize Courts, *p.* 58.

Manifestly it would be unjust to permit the claimant, by his *ex parte* affidavit, to present only such facts as he pleased and suppress others which might not be to his liking.

3 *Greenleaf on Evidence*, § 436.

Even if the substance of Hareke's affidavits and the exhibits had been established by competent evidence, the claimants would still have failed to show that the cargo of the *Carlos F. Roses* was neutral property.

The shippers, Gibernau & Company, were citizens of a neutral state, but it is not alleged or claimed that they retained the ownership of the cargo after its delivery to the vessel. They were commission merchants and in each invoice there appears a charge for their commission upon the shipment and in each it is expressly provided that the goods were shipped "*to order, for account and risk and by order*" of certain persons therein named. The consignees, named in the invoice, of the jerked beef were the owners of the vessel ("the expedition or voyage of the *Carlos F. Roses*") and "Mr. Pedro Pagés of Havana," all Spanish subjects. The consignees of the garlic were "Mr. Pedro Pagés" and Gibernau & Company ("the undersigned"). The ship's manifest signed three or four days after the invoices is not in accord with them. It shows that the goods were consigned "to order." This must have been an error, intentional or unintentional, for the vessel had a share in the shipment of jerked beef and the master must have seen that the

consignees were named in both invoices and that the shipments were made by their orders for their account and at their risks. A similar discrepancy appears in the bills of lading issued by the master to Gibernau & Company. There were three sets of bills. One covered the portion of the shipment of jerked beef made for the account of the vessel; another covered the part of that shipment made for the account of Pagés; the third, the shipment of garlic made for the joint account of Pagés and Gibernau & Company. All of the bills set forth that the goods were taken "for account of whom it may concern." This is an unusual thing in bills of lading (2 *Parsons on Contracts*, pp. 410–411) and in the present case, where the consignees were known to the master, it is difficult to see why he adopted such a course, if he were acting in good faith.

It is clear that when the goods were delivered to the vessel they became the property of the consignees, named in the invoices. Hence the shipment of jerked beef was owned by Pagés, or by him and the owners of the *Carlos F. Roses;* it is immaterial which, because all were Spanish subjects. One-half of the garlic belonged to Pagés. The remaining half was consigned to Gibernau & Company. This was the only part of the cargo having color of neutrality. Gibernau & Company did not claim it; therefore, it should have been decreed good prize.

The Adeline, 9 *Cranch*, 244.
The Harrison, 1 *Wheaton*, 298.
The Staat Embden, 1 *C. Rob.*, 26, 29.
3 *Greenleaf on Evidence*, § 443.

In reality the whole cargo was destined for Pagés, as the claimants admit, and would have been delivered to him at Havana (p. 18).

Neither bill of exchange contained any provision which could be interpreted as an assignment of the goods to the acceptor. If such had been the case the attempted assignment would have been invalid for want of a delivery of the goods. The bill drawn by Gibernau & Company named Kleinwort Sons and Company, the claimants, as acceptors and directed them to charge the amount to the account of "*Pedro Pagés of Havana, as per advice.*" The bill drawn by Maristany also named the claimants as acceptors, and directed them to charge its amount to "*the account of P. Roses Valenti of Barcelona, as per advice.*" In each case the acceptor was to look to the payee for payment, in the first instance, then to the other parties to the bill and not to any specific thing which had been given as security. It is alleged by Harcke that when the bills of exchange were presented to the claimants for acceptance they were accompanied by the bills of lading and invoices covering the whole cargo. The claimants contend that the possession of the bills of lading carried with it the ownership of the goods with full power of disposition. They say:

> "The said cargo was ultimately destined for Don Pedro Pagés of Havana, who, in the ordinary course of business, would, by payment to or indemnification of Kleinwort Sons and Company or their agents in that behalf take up the said bills of lading and thus be enabled to take the goods."

They say that with this end in view they forwarded all papers relating to the shipments consigned to Pagés and Gibernau & Company, to Gelak & Company, bankers of Havana, on April 9, 1898. Not only did they fail to show what instructions were given to Gelak & Company with regard to the disposal of the papers, but it appears

that Gelak & Company had not received them on June 9th, and there is nothing tending to show that they did receive them prior to October 4, 1898 (p. 35), or that they had not in the meantime been delivered to Pagés and the other consignees. As to the bill of lading, covering the jerked beef shipped for the account of the *Carlos F. Roses*, the claimants say that it "was not forwarded to Havana at all but was retained by the said Messieurs Kleinwort Sons & Company, pending the disposal of the said cargo" (p. 19). If the claimants had the right to prevent or interfere with the delivery of the cargo, and if they instructed Gelak & Company to retain possession of the bill of lading and invoice pending payment of the bill of exchange by Valenti or Pagés, and if such retention would have prevented the master of the vessel from delivering the cargo to the consignees, the claimants' failure to forward this bill of lading would have been a very peculiar transaction, because it would have left the ship under demurrage at Havana and left the perishable cargo to deteriorate, thus working injury to the interests of all concerned. In reality the claimants had no interest at stake in the venture of the voyage and had no concern in the shipments further than that a loss might impair the general responsibility of their debtors.

If the cargo had been delivered at Havana and the claimants, or their agents, had obtained possession of it, they could have acquired no rights superior to those of a bailee. As bailees, they could not have disposed of the goods or exercised other rights of ownership over them until the payees, who were also consignees, had failed to pay the bills. Thus, the claimants' right to the goods would have been contingent upon the happening of something which could not occur until the voyage was completed. The capture in-

tervening, the claimants never became bailees of the goods and never obtained any title to them.

Facts of like legal effect have been presented to this court in a number of cases and its decisions therein bear out our argument and conclusions.

In the case of the *Mary and Susan*, 1 *Wheat.* 25, it appeared that during the war of 1812 an American merchantman, bound from Liverpool to New York, was captured by a privateer. In her cargo were certain goods which had been shipped by British subjects. The invoice showed that the goods had been bought in England by Cross & Company, commission merchants, of Birmingham, "by order and for account and risk" of G. & H. Van Wagenen, the claimants, who were citizens of the United States. The goods had not been sent to the claimants by Cross & Company direct, but over a year before their shipment were forwarded to Liverpool in care of a firm of that city, and there stored, pending a cessation of hostilities. When delivered to the vessel the goods were accompanied by an invoice, signed by Cross & Company, in which it was said: "The goods are now the property of Messrs. Spooner, Atwood & Co., bankers, of Birmingham, to whom you will please remit the amount of this invoice." The actual shipment was made by still another Liverpool firm, the goods being consigned to the claimants in New York. With the goods were two letters. One was written by Cross & Company, in which they requested the claimants to remit the amount of the invoice to Atwood & Company, upon the arrival of the goods. The other was written by Atwood & Company, in which they said that the goods had been purchased by Cross & Company for the claimants' account, and were forwarded with the request that the amount of the invoice be remitted to the writers. They also said that Cross &

Company had sustained certain business reverses and that the writers having assisted them with funds had thought it right to obtain an assignment of the goods.

On behalf of the captors, it was admitted that a delivery of the goods by Cross & Company to the vessel would, in contemplation of law, have been a delivery to the claimants, but they contended that Atwood & Company were the shippers, because the goods had been assigned to Atwood & Company, and as there was no privity between the claimants and Atwood & Company they could not have compelled the claimants to accept them. They argued that the goods should be regarded as the property of the shippers and condemned as enemy property.

For the claimants, it was argued that the goods were purchased upon their order by Cross & Company, who retained possession of and title to them until their delivery to the vessel at Liverpool, when they became the claimants' property. Also, that the object of the assignment to Atwood & Company was not to defeat the relations of creditor and debtor subsisting between Cross & Company and the claimants, but merely to enable the bank to receive the amount of the invoice from the claimants: If the assignment had been intended to operate as a sale, it would have been invalid for want of a delivery of the goods to Atwood & Company, and, if intended as an authority to collect the money, the right of property remained in Cross & Company until it passed by delivery to the vessel.

In its opinion, the court said (pp. 39–40):

> "If the goods were shipped in pursuance of orders given by G. & H. Van Wagenen, the delivery on board the ship was a delivery to them; the property was vested in them by that act, and they had no election to accept or reject it.

"In pursuing this inquiry, the legal effect of the transaction must depend, in a considerable degree, on the intent of the parties, and that intent is, in this case, to be collected chiefly from their letters, and from the circumstances in which they stood. G. & H. Van Wagenen were American merchants desirous of receiving the goods they had ordered as soon as the importation of those goods should be allowed. Daniel Cross & Company were commission merchants of Birmingham, engaged in the American business. Spooner, Attwood & Company were bankers, friendly to Daniel Cross & Company; were desirous of promoting their interests, and recommending them to business, and had advanced them money while embarrassed by the difficulties consequent on the state of trade between the United States and Great Britain. Spooner, Attwood & Company were desirous, not of purchasing the goods stored at Liverpool by Cross & Company for the claimants; nor of interrupting the shipment of those goods, or the connection between Daniel Cross & Company and G. & H. Van Wagenen, but of permitting the shipment to proceed, and of receiving, themselves, the money to which Cross & Company were entitled. Such was the situation, and such the objects of all the parties."

Considering the evinence, the court said of Cross & Company's letter which accompanied the shipment (p. 41):

"This is the letter of an agent who has executed, completely, the order which had been given him; but who, having been compelled to borrow money, had transferred his pecuniary claims to his creditor."

Of the letter of Atwood & Company, it was said (p. 42):

"Nothing is said in this letter respecting the vessel by which the goods were sent; nothing indicating the exercise of any judgment by Spooner, Attwood &

> Co., respecting the time or manner of sending them; nor anything which would lead to the opinion that they interfered in any manner whatever in the transaction of the business."

Of the assignment by Cross & Company to Atwood & Company, it was said (p. 42):

> "Whatever may have been the form of this assignment, it is apparent that it could not have been made, and certainly was not made, with the intention of enabling Spooner, Attwood & Co. to defeat the shipment to G. and H. Van Wagenen, or to control the proceedings of Daniel Cross & Co. under the order they had received."

The court's view of the case upon all of the evidence is stated thus (p. 44):

> "The effect of the transaction is precisely the same as if they [Cross & Co.] had drawn a bill in favor of Spooner, Attwood & Co. for the amount of the invoice. It is said that the assignment gave Spooner, Atwood & Co. an election to ship the goods, or to dispose of them otherwise, and that the necessary consequence of this power of election is a correspondent right of election in G. and H. Van Wagenen to receive or reject them. The court does not view the transaction in this light. The assignment to Spooner, Atwood & Co. is understood by the court, from the evidence furnished by the letters, and the circumstances and objects of the parties, to have been subject to the right of Daniel Cross & Co. to execute completely, the order of the claimants. The interest of all parties were best promoted by pursuing this course, and they appear to have pursued it. The court perceives nothing which can justify the opinion that Spooner, Attwood & Co. had a right, or would have been permitted to intercept the shipment. Certainly it was neither their wish nor their interest to interrupt it.

> It is not reasonable, therefore, to suppose that they would have created any difficulty in obtaining a right to claim the amount of the invoice from G. and H. Van Wagenen by insisting on such an assignment as Daniel Cross & Co. would have been unwilling to make because it might have proved injurious to them without benefiting the house they meant to secure."

Thereupon the court affirmed the decree of the Circuit Court of the United States, by which the restitution of the cargo to the claimants had been ordered.

In the case at bar, it appears as clearly as in that of the *Mary & Susan* that the goods shipped were purchased by commission merchants in fulfillment of orders received from the consignees, who became the owners of and bound to accept the goods from the moment of their delivery to the vessel. All of the cargo was intended to be delivered to Pagés, whose business establishment at Havana would enable him to sell it at large prices to the needy citizens of that place. Such a course would promote, and any other would defeat, the interests of every one concerned. Kleinwort Sons & Company did not wish to purchase the jerked beef and garlic. They were a banking house, without facilities for dealing in food supplies, and accepted the bills of exchange for the discount which they charged upon them. It is not shown that they instructed Gelak & Company to retain the bills of lading until the bills of exchange had been taken up by Pagés. Evidently there was some special, undisclosed understanding between them and the other parties, with regard to the delivery of the goods, for they were of a perishable nature and, as we have already seen, the bill of lading covering the vessel's share of the jerked beef was never forwarded to Havana, although the bill covering

the rest of the cargo is said to have been sent to Gelak & Company on April 9th. The claimants say that they retained the former bill "pending the *disposal* of the said cargo" (p. 19). It is clear that they did not intend—even if they could—to control or delay its delivery to Pagés.

If the shipment by the *Mary & Susan* became the property of the consignees by delivery to the vessel, and, therefore, at the time of capture, was not condemnable as prize, because the consignees were citizens of the United States; in like manner the cargo of the *Carlos F. Roses* became the property of the consignees, who were Spanish subjects, and at the time of capture was condemnable as enemy property.

In the case of *The Francis*, 8 *Cr.* 418 (1814), a New York merchant claimed two shipments of goods which had been captured on board the vessel. They were condemned by the prize court as enemy property. On appeal the claimant asked leave to take further proofs, alleging: that one shipment was consigned to him by British subjects, in consequence of an advance made to them by the claimant, in consideration of the consignment; and, that the other shipment was made in virtue of a general balance due the claimant from the shippers. Both consignments were at the risk of the shippers.

The court said (p. 419):

> "To establish these claims in point of fact an order for further proof is asked for and the question is whether if proved the claim can, in point of law, be sustained.
>
> "The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt but that, agreeably to the principles of the common law of England,

a factor has a lien upon the goods of his principal in his possession for the balance of account due to him; and so has a consignee for advances made by him to the consignor. . . But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods seized in the vessel of a friend, which is always decreed to the owner of the vessel. . . But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. . . The principal strength of the argument in favor of the claimant in this case seemed to be rested upon the position that the consignor in this case could not have countermanded the consignment after delivery of the goods to the master of the vessel, and hence it was inferred that the captor had no right to intercept the passage of the property to the consignee. This doctrine would be well founded if the goods had been sent to the claimant upon his account and risk, except in the case of insolvency, but when goods are sent upon the account and risk of the shipper the delivery to the master is a delivery to him as agent of the shipper, not of the consignee, and it is competent to the consignor at any time before actual delivery to the consignee to countermand it and thus prevent his lien from attaching. Upon the whole, the court is of opinion that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and the sentence of the court below must be affirmed with costs."

The case at bar presents still stronger grounds for a decree of condemnation because the consignments were not made at the risk of the shipper, but "for account and risk and by order" of the consignees named.

The decisions of British prize courts are in accord with the foregoing authorities.

The Tobago, 5 *Rob.* 218. Here a claim to a captured French vessel was made on behalf of a British merchant, alleging that he was the holder of a bottomry bond which had been executed and delivered to him by the master of the ship before the commencement of hostilities between Great Britain and France. The court said:

> "The integrity of this transaction is not impeached, but I am called upon to consider whether the court can, consistently with the principles of law that govern its practice, afford relief. It is the case of a bottomry bond, given fairly in times of peace, without any view of infringing the rights of war, to relieve a ship in distress. . . Can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment, and demand restitution of such interests in a court of prize? . . . The person advancing money on bonds of this nature acquires, by that act, no property in the vessel; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a court of justice. . . It is said that the captor takes *cum onere*, and, therefore, that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply where the onus is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend takes it liable to the freight due to the owner of the ship; because the owner of the ship has the cargo in his possession. . . But it is a proposition of

a much wider extent, which affirms that a mere right of action is entitled to the same favorable consideration in its transfer from a neutral to a captor. . . Claims of such a nature. . . are private contracts, passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties. . . I am of opinion that there is no instance in which courts have recognized bonds of this kind as titles of property, and that they are not entitled to be recognized as such in the prize court."

The Marianna, 6 *Rob.* 24. The vendors of this vessel, who were citizens of the United States and neutrals, made claim to her cargo, which had been shipped by the purchaser, a Spanish merchant at Buenos Ayres, and consigned to the agents of the claimants at London. It was alleged that the proceeds of the sale of the cargo were to be received by the claimants and applied as part payment of the purchase money of the vessel. The claim was disallowed because the claimants' interest was not sufficient to support their claim of property. The court said:

"Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court, which

has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the court would be obliged to shut the door against such discussions and to decide on the simple title of property, with scarcely any exceptions. . . . As to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property. There must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property."

The Ida, Spinks' Prize Cases, 26. A claim was made by a neutral merchant to a cargo of coffee which had been consigned to him by an enemy on the credit of certain advances. Bills of lading covering the cargo had been delivered to him as security for the payment of such advances. The court declined to recognize the claimants' lien and condemned the cargo as enemy property.

II.

The Bills of Exchange could not have operated as a Transfer of the Cargo because it was In Transitu.

Both bills of exchange bear date after the goods were delivered to the vessel. The bills of lading had been

issued, and the goods were *in transitu*. A transfer then attempted to be made by the Spanish consignees to the British claimants would have been void.

The Sally Magee, 3 *Wall.* 451. This vessel was owned by residents of Richmond and, prior to the War of the Rebellion, had been engaged in the South American trade. Early in 1861 she sailed from Richmond for Rio de Janeiro with a cargo which was delivered at the latter port. On May 12th, before news of the outbreak of hostilities had reached Rio, and before the ship could have received any notice of it, she sailed on her return voyage. In her cargo was a shipment of coffee which had been made by Coleman & Company, commission merchants at Rio, a firm composed of British subjects. It was consigned to Dunlop, Moncure & Company, of Richmond. While on her voyage to Richmond the vessel was captured by a United States cruiser and sent in for adjudication. She and her cargo were condemned as enemy property. Coleman & Company, who had made claim to the shipment, alleging that they had a lien upon it and hence that it was neutral property and not subject to condemnation, took an appeal to this court. Mr. Justice Swayne, delivering the opinion, said (pp. 459, 460):

> "The other claim relates to the coffee consigned to Dunlop, Moncure & Company of Richmond, and it is not denied that this was enemy property. The claimants allege a lien. The claim states that Dunlop, Moncure & Company owed them a balance of upwards of $35,326, and that they were authorized and directed by that firm to receive and sell the coffee and apply the proceeds, as far as possible, to the payment of the debt and to hold the balance for the account of the debtor firm. . . . It is to be inferred also that the letters [conveying the alleged authority] were written after the shipment of the cargo and

indeed after the capture. In either case the arrangement was made too late to have any effect. The ownership of property in such cases cannot be changed while *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter designed to encumber the property or change its ownership is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure to save if possible something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

The Sally, 3 *Rob.* 300, *note* 3. During war between Great Britain and France a cargo of corn was shipped in an American vessel by a Baltimore firm, ostensibly for the account and risk of a Philadelphia firm, to whom it was consigned. An endorsement on the bill of lading provided that the vessel should proceed to Havre and there await the orders of the consignee, either to deliver the cargo at Havre or at any port without the Mediterranean. Among the papers was a letter from the French Minister at Washington to the French Minister of Foreign Affairs, in which he said that the Philadelphia firm had been ordered by him to procure provisions which were to be sent as American property to Havre. Another letter from the same official to the Mayor of Havre informed him that "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship *The Sally*, is laden with a cargo of wheat, of which he will deliver

you the bill of lading." The vessel was captured and the nominal consignees—the Philadelphia firm—made claim to the cargo. The court said:

> "It has always been the rule of the prize courts that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property."

Some additional light is thrown upon the present case by the circumstances under which the voyage of the *Carlos F. Roses* was made and her cargo was shipped. The Cuban insurrection had been in progress for upwards of three years. The Spanish troops, and people of the island who remained loyal to Spain and continued to reside in Havana, were in dire need of food. When the vessel sailed from Montevideo the United States and Spain were on the eve of war. All of the things which led the United States to acknowledge and demand from Spain the independence of Cuba had transpired. In the words of Congress:

> ". . . the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating as they have in the destruction of a United States battleship with two hundred and sixty-six of its officers and crew while on a friendly visit to the harbor of Havana, and cannot longer be endured." (30 Stat. L. 738.)

Foreign nations, including Spain, were before us in appreciating that war was inevitable. Through several

cases, already adjudicated, it is known to this court that Spanish ships which sailed from foreign and neutral ports during March of 1898, were insured against the risks of war. It must have been evident to every one that, as the first act of hostility, the United States would establish a blockade of Havana and other Cuban ports. Merchants throughout the world knew that commodities of all kinds were bringing exorbitant prices in Havana and that few more cargoes could be delivered. Pagés appreciated the desirability of getting in a large cargo of food supplies and had thought it best to place his order in a foreign state, rather than in the United States. The owners of the vessel appreciated that an opportunity was offered which, although it involved some risk, yet promised an opportunity for getting large profits. The value of the ship was small. Her share of profit, had she succeeded in delivering the cargo, would have more than equalled her value. The shippers, too, appreciated the opportunity. Hence the anxiety of these three parties to join in the venture of a voyage. The bills of exchange issued by the shippers and the master were not presented to the claimants for acceptance until April 6th, only two weeks prior to the outbreak of war. They made no attempt to assert the ownership of the goods, or prevent their delivery at Havana. They retained one of the bills of lading, presumably with the idea of permitting the delivery of the cargo to the consignees, if all things went well; but of claiming to own it in case war intervened and the ship were captured by the United States.

There can be no doubt that it was the duty of the *New York* to make the capture and send in the *Carlos F. Roses* and her cargo for adjudication. The vessel was enemy property beyond a peradventure. The cargo bore every evidence of being what it in reality was—enemy property.

The delivery of the cargo was of the highest importance to the enemy, and its delivery at a blockaded port, the head center of Spanish dominion in the West Indies, was prevented only by capture.

We submit that the decree of the court below should be reversed.

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